

Supreme Court, U. S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

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No. 77- **1162**

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**JONES TRANSFER COMPANY,
CENTRAL TRANSPORT, INC.
AND U.S. TRUCK COMPANY, INC.,**
Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

—•—
**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

—•—
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**PETITION FOR A WRIT OF CERTIORARI
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Petitioners, Jones Transfer Company, Central Transport, Inc., and U.S. Truck Company, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 29, 1977.

¹ Respondents to this petition are: United States of America and Interstate Commerce Commission; Rocky Mountain Motor Tariff Bureau, Inc.; Southern Motor Carriers Rate Conference, Inc.; and Middle Atlantic Conference, intervenors in support of respondents below, and Ford Motor Company and the National Industrial Traffic League, petitioners below.

ORDERS AND OPINIONS BELOW

The judgment and opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. (3a)² The initial report and order of the Interstate Commerce Commission, *Detention of Motor Vehicles - Nationwide*, 124 M.C.C. 680 (15a), was decided May 12, 1976. A second report and order of the Commission on reconsideration, *Detention of Motor Vehicles - Nationwide*, 126 M.C.C. 803 (135a), was decided June 3, 1977. A third order of the Commission, as yet unpublished, was issued September 14, 1977 (165a). All of said orders are included in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered December 29, 1977, and this petition for a writ of certiorari has been filed within 90 days of that date. This court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in construing this Court's opinion in *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), as precluding any meaningful inquiry by a reviewing court into the existence of a stated reasoned basis for agency action or the absence of a rational connection between agency findings and the ultimate remedies adopted?

² References to the consolidated appendix which has been submitted by these petitioners and other petitioners seeking review of the proceedings below are given as "____a".

2. Did the Interstate Commerce Commission act arbitrarily and capriciously in promulgating rules that constructively bar common motor carriers from delivering freight to the consignees in those circumstances where the motor carriers make use of temporary parking areas at the facilities of the consignees, where the agency failed to articulate a reasoned basis for its decision and, where in particular the basis articulated by the agency is demonstrably erroneous on the record below?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 5

Section 706 - Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

* * * * *

(2) Hold unlawful and set aside agency action, findings and conclusions found to be —

(A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * * * *

United States Code, Title 49

National Transportation Policy (49 U.S.C. preceding Sections 1, 301, 901, 1001)

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; — all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Code of Federal Regulations, Title 49

Section 1307.35(e) (2) (Proposed)

Section 2. Definitions

* * * * *

(f) "Spotting" means the placing of a trailer at a specific site designated by consignor, consignee, or other party designated by them, detaching the trailer, and leaving the trailer in full possession of consignor, consignee, or other designated party unattended by carrier's employee and unaccompanied by power unit. Carrier will not move the trailer until such time as it has received notification pursuant to Section 3, that the trailer is ready for pickup at any site on premises. Consignor, consignee, or other designated party may shift the spotted trailer with its own power units at its own expense and risk for the purpose of loading or unloading. Empty trailers placed at the premises of consignor without specific request are not spotted until the carrier receives a consignor's request and places a trailer for spotting. Movement of the trailer from the consignor's premises to the specific site for spotting shall be the obligation of the carrier, and free time shall accrue as provided in section 3.

STATEMENT OF THE CASE

Under notice and comment rulemaking procedures pursuant to Section 553 of the Administrative Procedure Act, 5 U.S.C. §553, the Interstate Commerce Commission promulgated uniform rules to regulate detention of motor common carrier vehicles by shippers and receivers (consignees) of freight. One of these rules, Section 2(f), defined circumstances under which a motor carrier trailer will be deemed "spotted" at the facilities of a consignee. Under Section 2(f), a trailer is spotted when it is detached from its power unit and left in the full possession of the consignee. The impact of such spotting is that the carrier's line haul transportation service is deemed to be at an end, and its delivery is deemed completed.

In its decision adopting these rules, the Commission took the position that *any* detachment of a trailer on the property of a consignee would cause a trailer to be "spotted". (73a, 139a, 168a) Such a construction would apply even in a situation where a carrier was merely using a consignee-owned parking area to detach trailers from its over-the-road tractors, for subsequent delivery by other tractors under its control. Under the Commission's interpretation of Section 2(f), any such temporarily detached trailer would be considered spotted, even where the carrier retained possession of the trailer, and the carrier's transportation service would terminate. A consignee would thus be required to secure its own carrier service to have such a trailer moved to the desired point of unloading, or else pay an additional delivery charge to the delivering carrier.

Such a rule will result in needless and wasteful conversion of motor carrier operations to a so-called "live" delivery system. At present, petitioners and many other carriers temporarily detach their trailers in consignee parking areas ("holding yards") to allow their locally-based equipment to make actual deliveries. Such detachment frees over-the-road equipment to perform other highway operations while actual delivery of detached trailers is performed by one switching tractor. The alternative, use of road equipment to make actual deliveries, unnecessarily causes skilled drivers with costly highway equipment to sit idle at consignee facilities waiting for their vehicles to be unloaded. By imposing added delivery costs on consignees when trailers are temporarily detached, Section 2(f) economically compels consignees to require live deliveries. Evidence adduced before the Commission indicated that a substantial shift to such inefficient live deliveries will occur if the proposed rule becomes effective.

The holding yards presently used by motor carriers at consignee facilities are parking areas controlled by the carriers themselves or their agents. (J.A. 29)³ Consignee involvement in these facilities is limited to providing security services. (J.A. 30) When a carrier brings a loaded trailer into a holding yard for delivery, it notifies the consignee of the availability of the trailer for delivery and unloading and leaves the trailer in the possession of its agent. (J.A. 30) When the consignee advises that it can accept delivery, the agent then moves the trailer from

³ References to the administrative record in the Joint Appendix before the Court of Appeals below are given as "J.A.".

the holding yard to the actual point of unloading. To avoid having trailers unduly detained while awaiting consignee unloading, carriers publish provisions charging the consignee for the length of time the trailer is detained. (J.A. 29) As soon as notice of arrival is given, the consignee is allowed a stated free time period for unloading and then is charged on an hourly or daily basis for additional detention time. Trailers parked in holding yards are always subject to the running of such detention charge provisions; no free storage is provided to the consignee. (J.A. 31)

Section 2(f) arose from the Commission rulemaking proceeding in Ex Parte No. MC-88, *Detention of Motor Vehicles - Nationwide*. The central focus of this proceeding was the detention of all types of motor carrier vehicles by shippers and consignees for the purpose of loading or unloading. (117a) In addition to the detention provisions applicable in holding yards, carriers generally assess charges against shippers or consignees for any detention of trailers or power units delayed in loading or unloading. The Commission's primary concern in initiating its rulemaking proceeding was the need for promulgating uniform rules for the assessment of such charges, with the attendant elimination of discrimination between shippers in the assessment of such charges. (17a-18a) A related concern was whether all carriers should be required to publish "pre-arranged scheduling" provisions in their detention rules, whereby shippers or receivers could make appointments for the arrival of carrier vehicles and not be charged for detention if such vehicles arrived ahead of schedule.

Section 2(f), and the Commission's interpretation of that section, further none of the Commission's stated goals in promulgating detention rules. Rather, the Commission has used Section 2(f) to require the imposition of extra transportation charges on consignees receiving freight through holding yards, by ruling that such trailers have been spotted and thus finally delivered when they are parked at the carrier holding yard. However, after three Commission reports and a voluminous underlying record, there is still a complete absence of any basis, factual or legal, to justify this ruling. This is a case in which

- the Commission's own language in Section 2(f) fails to support the conclusion in the Commission reports that trailers in carrier holding yards must be deemed spotted,
- each of the Commission reports states that trailers in carrier holding yards should *not* be considered spotted, in juxtaposition to contrary statements in the same reports,
- Commission counsel on appellate brief below advanced a position directly opposite to statements of the Commission itself that trailers in holding yards are not spotted, and
- the only rationale supporting the Commission's constructive ban on holding yards is founded on totally baseless factual premises.

It is difficult to fathom an administrative record that could be less supportive of an agency's ultimate conclusions.

As noted, Section 2(f), on its face, does not consider a trailer spotted and thus terminate line haul service unless

the trailer is left *"in the full possession of the * * * consignee * * * unattended by carrier's employee."* (Emphasis added) However, in its reports adopting Section 2(f), the Commission has specifically stated that *all* trailers left in holding yards are deemed spotted. The Commission states:

The definition of "spotting" contained in Section 2(f) and item 33 on page 737 [73a] of the prior report and order make it clear that the carriers' line-haul obligation ends when a loaded trailer is dropped in the consignee's holding yard. The cost of moving the trailer from the holding yard to the unloading dock is the responsibility of the consignee. (168a)

As noted, holding yards are attended by carrier employees, and trailers in holding yards remain in the carriers' possession. Accordingly, the finding that all trailers in holding yards are "spotted" is inconsistent with the plain language of Section 2(f). Indeed, the Commission's interpretation takes the unusual step of holding that a carrier's service is deemed completed even before the carrier has given up possession of its freight. Nevertheless, the Commission has continued to adhere to the view that Section 2(f) makes all trailers left in holding yards spotted and thus subject to no further carrier movement.

Even the adopting reports of the Commission itself contain statements that trailers left in carrier-supervised holding yards should not be considered spotted. Under the proposed rules, trailers which are not spotted are subject to delivery under the terms of the so-called "detention with power" rules. (154a-158a) (as opposed to the "detention without power" rules which apply to spotted trailers. 158a-161a) Such rules apply to the

delivery and holding of trailers which remain in the possession of a carrier or its agent. At numerous points, the Commission reports state that, as holding yards are operated by carriers, trailers left in holding yards are still in the carrier's possession and thus are subject to the rules for detention with power. For instance, in its first report, the Commission stated:

If the carrier must leave the vehicle in a holding yard arrangement with either itself or its agent moving the trailers, then any accrued detention is subject to the charges for vehicles with power units, * * *. (73a)

Similarly, the Commission stated in its second report that:

Lower charges for detention without power are based on the economies which carriers realize by not having drivers and power units tied up in unproductive waiting time. These economies are lost when a carrier must either return a tractor to the yard to shuttle a trailer, or pay an agent to do so. (139a)

These statements are in direct contradiction to the Commission's concurrent statements that trailers in holding yards are deemed spotted. If trailers are spotted, they are subject to charges for detention without power. There is no indication in the Commission reports themselves as to which category of charges should actually be applicable.⁴

⁴ In its third report, the Commission also stated that a trailer left in an origin holding yard could not be deemed to be left in the full possession of a consignor, and thus spotted "because the carrier is free to move or even remove the trailer altogether". (166a) A carrier maintaining a destination holding yard would similarly be free to move trailers within the holding yard. Accordingly, by the Commission's logic, such trailers should similarly be considered not to be spotted.

Before the Court of Appeals, petitioners argued that even if the detention with power provisions were those applicable to trailers left in holding yards, the Commission had failed to justify the high level of charges called for by such provisions.⁵ However, the Commission brief in no way responded to this argument. Rather, Commission counsel on brief chose to completely abandon any statements below suggesting detention with power provisions applied. The Commission brief stated:

Contrary to Jones' assertion, spotted trailers which are shifted [from holding yards to unloading docks] *will not be subject to charges for detention of motor vehicles with power * * **. (Joint Brief for the Interstate Commerce Commission and the United States, p. 27) (Emphasis added)

This statement completely contradicted the statement in the Commission's first report that:

If the carrier must leave the vehicle in a holding yard arrangement with either itself or its agent

⁵ The level of detention charges for vehicles with power was prescribed by the Commission based on a combination of Commission average cost figures and comparisons with existing levels of detention with power charges. The result of applying detention with power charges would be to assess virtually confiscatory detention charges for trailers spotted at holding yards. Detention with power charges are \$432.00 per trailer per day, over 17 times as high as the initial charge for trailers without power. The cost figures used to develop the charges for detention with power are full labor and investment costs for a continuously-present tractor, trailer, and driver. (58a) Such charges bear no relation to the holding of upwards of 40 trailers in a holding yard manned by only one employee and one small yard tractor unit. The Commission clearly did not have holding yard operations in mind when it formulated the level of charges for detention with power. Indeed, such charges would be confiscatory, and no shipper or receiver of freight would utilize holding yards with such charges in being.

moving the trailers, then any accrued detention is *subject to the charges for vehicles with power units.* (73a-74a) (Emphasis added)

Neither of the Commission's first two reports advanced any explanation of what public interest would be served by a policy that would treat parking of a trailer in a carrier controlled holding yard as a spotting and final delivery, so as to force a consignee to pay an added charge to obtain an actual delivery of its freight. Only in the Commission's third report is a policy justification advanced to support the Commission's position. According to the third report, holding yards are discriminatory devices, aimed at allowing large shippers to avoid the payment of detention charges on parked trailers. (168a) The Commission stated that loaded and empty trailers "should not have to wait hours and days in limbo before free time toll" (169a) and that petitioners proposed a "convenient holding yard arrangement" with "little or no likelihood of incurring detention charges". (168a) Such a finding ignored the fact that both shippers and carriers had repeatedly stated that detention charges begin to run as soon as a trailer has been placed in the holding yard. (J.A. 31, 61, 1230, 882, 906) Indeed, petitioners urge assessment of the same level of detention charges against the consignee as proposed by the Commission, covering the same detention period. Petitioners oppose only the termination of carrier line haul service at the point of temporary holding. Thus, the Commission's justification is based on a completely erroneous factual premise. Further, a Commission comment that large shippers served from holding yards had greater control over deliveries than smaller shippers served by live deliveries (168a) ignored the fact that such advantage had been specifically eliminated

by the Commission's first report requiring that all consignees be provided with deliveries on pre-arranged schedules. (46a) The discrimination found to exist had already been eliminated by another provision of the detention rules. Thus, the only justifications advanced by the Commission for a policy against service through holding yards were completely lacking in any factual basis.

Accordingly, the adoption of Section 2(f) as construed by the Commission is based solely on the bare conclusion that an added cost burden should be imposed on consignees who receive freight through a holding yard delivery system. The Commission made no study of whether the cost of such a delivery system was any greater than the cost of making live deliveries. Indeed, the only evidence of record showed that carrier costs were *less* when a holding yard system was used. (J.A. 887-890) Rather, the Commission concluded that added charges must be imposed on consignees served through holding yards even if it were established that holding yards offered a positive benefit in carrier convenience. (73a) Again, no justification was advanced for an argument that would require consignees to pay *more* for a service which would cost the carriers *less*.

The requirement of an extra charge for delivery of a trailer after placement in a holding yard is directly contrary to established Commission precedent. As urged before the Commission, in *Carrier Switching at Industrial Plants in the East*, 294 I.C.C. 159 (1955), the Commission permitted the nation's rail carriers to move cars from temporary holding sites to delivery locations as a part of their line haul service. The specific justification for this ruling was the Commission's finding that motor carrier

line haul service *included* such deliveries from temporary holding yard areas. (294 I.C.C. at 167) However, the Commission below disclaimed this precedent without explanation, stating merely that the *Carrier Switching* case was "not analogous". (73a)

Following exhaustion of their administrative remedies, petitioners sought judicial review of the Commission's adoption of Section 2(f). In a *per curiam* opinion filed December 29, 1977, the Court of Appeals denied the petition for review. (3a) The sole basis for the court's denial was its interpretation of this Court's opinion in *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972). The Court of Appeals stated that *Allegheny-Ludlum* "severely limits the extent of judicial review". (9a) It noted that the Commission's treatment of the issues had been "laconic", and that the Commission's conclusions bore little relation to the rulemaking record developed in these proceedings. (10a) At no point did the court indicate where the Commission had articulated a reasoned basis for its actions, or specify what rational connection existed between the Commission's findings and its ultimate conclusions. However, relying solely on *Allegheny-Ludlum*, the court concluded that "the Commission's findings and conclusions 'are rationally supported'." (11a) The words "rationally supported" were placed in quotation marks in the court's opinion, indicating the degree to which the court felt its powers circumscribed by the *Allegheny-Ludlum* decision.

REASONS FOR GRANTING THE WRIT

The decision of the Third Circuit below has improperly read *Allegheny-Ludlum* as barring any meaningful inquiry by a reviewing court into the existence of an articulated and reasoned basis for an administrative agency decision. *Allegheny-Ludlum* is not a "severe limitation" on the standard of judicial review, as found by the Third Circuit. Rather, *Allegheny-Ludlum* itself, subsequent decisions of this Court, and subsequent decisions of the Courts of Appeals, require a full inquiry by reviewing courts as to whether an agency decision was based on a thorough consideration of relevant factors, whether an agency has genuinely engaged in reasoned decision making, and whether there has been a clear error in agency judgment. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-416 (1971); *F.P.C. v. Texaco*, 417 U.S. 380, 395-96 (1974); *Bowman Trans. v. Arkansas-Best Freight*, 419 U.S. 281, 285 (1974); *F.P.C. v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976). In failing to find adoption of Section 2(f) arbitrary and capricious, the opinion of the Third Circuit is squarely in conflict with these decisions, and with many decisions of other circuits. The Third Circuit has clearly misconceived and misapplied the precedent set forth in *Allegheny-Ludlum*. Compare, *Wilkinson v. United States*, 365 U.S. 399, 401 (1961). In holding that placement of trailers in a carrier holding yard constitutes a final delivery, and requires the payment of an additional charge in order to effect the actual delivery, the Commission reports below prescribe a policy which is

- (1) contrary to the plain meaning of the actual rule being adopted.

- (2) contrary to statements contained in the reports themselves,
- (3) so inconsistent that certain portions of the reports were directly contradicted in the Commission's brief to the Court of Appeals,
- (4) based on a completely erroneous understanding of present detention charge assessment in holding yards, and
- (5) at odds with prior decisions of the Commission and this Court.

Accordingly, the Third Circuit failed to apply a proper judicial standard in affirming this decision of the Commission.

1. There is no basis for the conclusion of the Court below that *Allegheny-Ludlum* constitutes a severe limitation on the extent of judicial review. While the quoted language in the opinion below (9a-10a) may suggest such a limitation, a complete reading of *Allegheny-Ludlum* shows a clear reaffirmance by this Court of established judicial functions in the review of administrative agency decisions. The portion of the *Allegheny-Ludlum* opinion at 406 U.S. 749-755 contains a detailed analysis of the underlying facts, findings, and conclusions of the agency below. *Allegheny-Ludlum* specifically adopts the well established requirement of a rational relationship between the agency's ultimate conclusions and the factual bases in the record upon which the agency relied. (406 U.S. at 755-756) *Allegheny-Ludlum* affirms the established precept of judicial review that an agency must adequately explain its departure from prior norms and sufficiently spell out the basis of its legal decision. (406 U.S. at 756) Further,

Allegheny-Ludlum reviews the rationality of agency action in light of the underlying conditions determined in the course of agency rulemaking proceedings. (406 U.S. at 753)

Neither the subsequent decisions of this Court nor the subsequent decisions of Courts of Appeals have interpreted *Allegheny-Ludlum* as requiring a narrowed scope of judicial review. The subsequent decision of this Court in *F.P.C. v. Texaco*, 417 U.S. 380 (1974), specifically reiterates that courts must make positive determinations as to whether agencies have exercised their statutory discretion in rulemaking, and that agency decisions may not be sustained merely on the basis of post-hoc rationalizations of counsel. (417 U.S. at 396, 397) District courts and courts of three circuits have cited *Allegheny-Ludlum* as an appropriate standard for judicial review and remanded agency rulemaking proceedings for lack of adequate explanation of agency findings or lack of rational basis for agency action. *B.F. Goodrich Company v. Department of Transportation*, 541 F. 2d 1178 (6th Cir., 1976); *cert den.* 430 U.S. 930 (1977); *Alabama Association of Insurance Agents v. Board of Governors*, 533 F. 2d 224 (5th Cir., 1976); *South Terminal v. E.P.A.*, 504 F. 2d 646 (1st Cir., 1974); *Chemical Leaman Tank Lines, Inc. v. United States*, 368 F. Supp. 925 (D. Del., 1973); *Ann Arbor Railroad Co. v. United States*, 358 F. Supp. 933 (E.D. Pa., 1973). Other courts, while affirming agency actions, have cited *Allegheny-Ludlum* as mandating a broad standard of judicial review of agency action. *Dallas City Packing, Inc. v. Butz*, 411 F. Supp. 1338 (N.D. Tex., 1976); *Florida East Coast Railway Co. v. United States*, 368 F. Supp. 1009 M.D. Fla., 1973); *Ann Arbor Railroad Co. v. United States*, 368 F. Supp.

101 (E.D. Pa., 1973). The severely limited view of judicial review set forth by the Third Circuit in the proceeding below is directly in conflict with the standards of review applied in these cases.

The only basis for the divergent standard applied by the Third Circuit would appear to be that judges of that circuit were those reversed by this Court's opinion in *Allegheny-Ludlum*. *Allegheny-Ludlum Steel Corporation v. United States*, 325 F. Supp. 352 (W.D. Pa., 1971). Indeed, such reversal is noted in the opinion below. (10a) However, the mere fact of specific reversal imposes no different standard on a court below than that applicable to all inferior courts. *Cf. Norton v. McShane*, 332 F.2d 855 (5th Cir., 1964), *cert. denied* 380 U.S. 981 (1965). The Third Circuit was obliged only to observe the general precedent of *Allegheny-Ludlum*, rather than imposing any unduly narrow standard as a result of the prior reversal by this court.

2. The decision of the Commission should be found to be arbitrary and capricious, within the meaning of 5 U.S.C. §706. The position taken in the Commission reports is one which is inconsistent with the actual rule adopted in such reports, directly contrary to specific statements in these reports, founded on totally non-existent factual premises, and completely contrary to prior Commission precedents. Further, on brief before the Court of Appeals, Commission counsel took a position directly opposite to that stated in the reports of the Commission below. Any proper application of the standards of judicial review should find the Commission's action to be arbitrary and capricious.

Initially, the policy announced in the Commission's decision does not comport with the plain meaning of the pertinent rule being adopted. The Commission's policy.

as announced in its three reports, is that placement of a loaded trailer in a temporary holding yard constitutes a "spotting" of the trailer which brings the carrier's line haul obligation to an end. (73a, 139a, 168a) However, the adopted rule itself, Section 2(f), states that spotting may only be deemed to occur when a trailer is left "in full possession of the * * * consignee * * * unattended by carrier's employee." As holding yards are operated by carrier employees or agents, trailers placed in holding yards can in no way be deemed spotted within the plain meaning of Section 2(f). It is clear that the statements of the Commission in its adopting report are binding on parties to this proceeding, even though such statements do not appear on the face of the adopted rule itself. *Consolidated Flower Shipments, Inc. v. CAB*, 213 F. 2d 814, 818 (9th Cir., 1954); *Freight Consolidators Cooperative, Inc. v. United States*, 230 F. Supp. 692 (S.D. N.Y., 1964). However, where an agency urges a strained and unnatural construction of a promulgated rule, considerations of notice and clarity place a heavy burden on the agency to justify the inconsistencies between the rule and accompanying explanation. *F.P.C. v. Texaco*, 417 U.S. 380, at 395 (1974). At very minimum, the Commission's proposed rule and its adopting order are so inconsistent as to be patently ambiguous and lacking in the standard of clarity which administrative orders must exhibit. *Id.* at 396.

Secondly, the Commission reports themselves are patently inconsistent in their varying statements as to the provisions applicable to the detention of trailers in holding yards. The Commission reports variously state that trailers are considered spotted and the carriers' line haul delivery obligation is considered ended when trailers are parked in holding yards. (73a, 139a, 168a) At other

points, the Commission reports state that trailers left in holding yards will not be considered spotted, but rather, that the Commission's detention with power provisions would apply to allow for a full delivery under line haul rates. (73a, 139a, 166a) Again, it is impossible to tell what result is intended by the Commission, or upon what basis, if any, the Commission has chosen one alternative construction over the other. It is not the function of a reviewing court to resolve inconsistencies in an agency decision. *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943); *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-68 (1962). With such patent inconsistencies as to what the Commission actually intended in this proceeding, the Commission decisions clearly may not be sustained.

Thirdly, rather than dealing with potential defects in the record which would be occasioned by a conclusion that the Commission's detention with power rules applied to trailers placed in holding yards, the Commission counsel on appellate brief made a determination to abandon those statements in the Commission reports suggesting that detention with power provisions apply. Such an abandonment was never indicated in any of the Commission reports, but rather, was a completely unsupported action by counsel. Post-hoc attempts to rationalize agency decisions cannot be accepted where a rational basis is not provided in the decision of the agency itself. *Burlington Truck Lines v. United States*, *supra* at 371 U.S. 156, 168-69 (1962). Even a reviewing court is without power to sustain an agency action based on findings or reinterpretations which an agency *might* have made. *S.E.C. v. Chenery Corp.*, *supra* 318 U.S. 80, at 94. Obviously, agency counsel are similarly not empowered to make such determinations for the agency itself.

The Commission's only explanation of its policy reasons for its interpretation of Section 2(f) is based on completely erroneous factual premises. The Commission was completely in error in stating that present holding yard practices allow trailers to remain "in limbo" without the tolling of detention charge provisions. (169a) There is no support in the record for such a conclusion. To the contrary, petitioners and many other parties indicated that detention charges do apply to trailers placed in temporary holding yards. To the extent that an agency relies on record matter in informal rulemaking, it is obliged to relate its ultimate conclusions to the matter developed on the record. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *F.P.C. v. Texaco*, 417 U.S. 380, 396 (1974); *National Association of Food Chains, Inc. v. I.C.C.*, 535 F. 2d 1308 (D.C. Cir., 1976); *Tanners' Council of America v. Train*, 540 F. 2d 1188, 1193 (4th Cir., 1976); *Hooker Chemicals & Plastics Corp. v. Train*, 537 F. 2d 620 (2nd Cir., 1976). There is no basis in this record for rationalizing Section 2(f) as an anti-discriminatory device.

The Commission's decision essentially reduces to a mere general conclusion that consignees whose freight is being delivered through the temporary parking of trailers in holding yards should pay an extra transportation charge. There are no underlying findings of fact to support such a conclusion, and no discussions as to why such a conclusion is warranted. To the extent that cost evidence was submitted pertaining to holding yard delivery service, the evidence showed that such service was less expensive than live delivery service, rather than representing any sort of "extra" operation. (J.A. 887-890) In any event, costs apparently did not play a part in the Commission's decision to impose an extra charge, as it

stated that such charges would be imposed even where holding yards served the convenience of the carriers. (73a) Further, the Commission completely brushed aside motor carrier concerns that the Commission's policies would compel consignees to require inefficient live deliveries. The Commission's only response was that holding yards could continue if consignees were willing to pay extra charges. (168a) Accordingly, the Commission's decision to impose such a charge is a mere conclusion, unsupported by any record justification or analysis.

Lack of such justification is particularly significant where, as here, Commission precedent holds that deliveries from temporary holding yards are included within motor carrier line haul service. The Commission's 1955 *Carrier Switching* decision unequivocally stated that motor carrier line haul service *included* movement of trailers to unloading sites after temporary placement in parking areas. *Carrier Switching at Industrial Plants in the East*, *supra*, 294 I.C.C. 159, at 167 (1955). This rule is also contained in numerous other Commission decisions, including *Hygrade Food Products Corp. Terminal Allowance*, 306 I.C.C. 557, 559 (1959) and *Medusa Portland Cement Co. Terminal Services*, 287 I.C.C. 57, 62 (1952). It is a sharp departure from past decisions to reverse such a conclusion and hold that temporary parking effects a termination of line haul service. Compare *Atchison T. & S.F.R. Co. v. Board of Trade*, 412 U.S. 800, 807-8 (1973); *Secretary of Agriculture v. United States*, 347 U.S. 645, 653 (1954)⁶. The

⁶ Indeed, the Commission's rule has always been that it will not allow a separate charge for what had formerly been a part of line haul service absent a finding of the reasonableness of charges for both the separated service and the remaining line haul service. *Atchison T. & S.F.R. Co. v. Board of Trade*, *supra*, at 412 U.S. 800, 809 (n. 6), and cases cited therein.

Commission's bare finding that the *Carrier Switching* case was "not analogous" falls far short of this Court's requirement that "the ground for departure from prior norms * * * must be clearly set forth so that the reviewing court may understand the basis of the agency's action." *Atchison T. & S.F.R. Co. v. Board of Trade*, *supra*, at 412 U.S. 800, 808 (1973).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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